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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 811

F. W. WOOLWORTH CO.,

Petitioner,

vs.

HENRI A. MEIS, TRUSTEE UNDER AGREEMENT DATED DECEMBER 26, 1945, AND KNOWN AS THE BLANCHE MEIS TRUST,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the case of *Kaufman* v. *Shoe Corporation of America*, 24 Ill. App. 2d 431, 164 N. E. 2d 617 (Third Dist., 1960) there was no testimony as to the actual intentions of the parties. There was no holding that the real intentions of the parties was not the rule of decision if it could be determined. In the present case both Courts below had evidence of negotiations preliminary to the execution of the lease:

ARGUMENT.

I.

The Majority Opinion of the Seventh Circuit Court of Appeals and the District Court Did Not Depart From Illinois Law, but Distinguished This Case on the Facts.

The petitioner argues that a different result will be obtained by an Illinois litigant, depending upon the choice of a federal or state forum. This depends upon the validity of petitioner's statement, petition, p. 6:

> "The majority opinion *attempted* to distinguish the *Kaufman* case on the ground that the evidence of intention rendered inapplicable the otherwise undisputed Illinois rule that the landlord is liable". (Emphasis supplied.)

However, the *Kaufman* Court itself would decide the instant case as did the District Court and Circuit Court of Appeals if this statement in the majority opinion be correct:

> "We cannot read the *Kaufman* case as making it incumbent upon the landlord to expressly exempt himself in the lease from such a liability where there is substantial evidence of intention." (Appendix to petition for certiorari, p. 5.)

Petitioner, in its first brief in the Circuit Court of Appeals said that intention could be ascertained only from the four corners of the written lease:

> "It is a primary rule of lease interpretation that the intention of the parties is to be determined from the instrument itself." (Petitioner's Appeals Court brief, p. 25.)

In its reply brief in that Court, however, this concession appears:

> "On pages 14 and 15 of his brief, Meis cites authority for the proposition that parol evidence of preliminary negotiations is to be given its natural probative effect. Woolworth accepts and affirms this rule". (Petitioner's Appeals Court reply brief, p. 10.)

Intention of the parties, then, is the cardinal standard of construction. Petitioner denies the effect of the undisputed testimony of the negotiations and of the deletions from successive drafts of the lease prior to its final form. Both District Court and Circuit Court of Appeals note that petitioner offered this evidence, as did respondent. In both instances this was without objection.

The intermediate court of review, the Appellate Court for the Third District of Illinois, which decided *Kaufman*, had before it only the pleadings in the declaratory judgment action, with the lease as an exhibit to the complaint. There was no "heat clause" in the lease in the *Kaufman* case. The tenant had not re-built a destroyed building, as here, to make such alterations, additions, and changes to the demised premises as "it deems necessary or convenient to fit the same for its occupancy * * *" Naturally there was no evidence of demand, as here, that the landlord supply heat during the whole of a long term, nor was there a refusal on the part of the landlord, as here, to undertake any obligation to furnish heat.

Petitioner Woolworth chose its own source of heat, the economic burden of which it undertook to assume during the entire term of the leasehold. Through the fault of neither, this source of heat failed. The burden of heating the building was undertaken by the tenant; it was undertaken after protracted negotiations in which the tenant first sought to impose this burden on the landlord. The landlord affirmatively said that he would have no obligation for heat or heat-

ing plant in the future, and this was accepted. The landlord agreed to pay $140,000.00 to the tenant upon completion of the building by the tenant—no more and no less.

The parties did advert to heat and negotiated a "heat clause." Knowingly, the tenant undertook all future contingencies with respect to heating the building. There should be no distinction between "heat" and a "source of heat" where the total cost of paying for heating the building was the obligation of the tenant. The parties had reached agreement on the subject. The findings and inferences of the District Court were clearly justified if the negotiations are to be considered. The landlord in the present case did not refuse to supply heat because "there is a utility supplying heat," as petitioner says (Petition, p. 8) but he refused to supply heat because he wanted to be relieved of any obligation to heat the building. If acceptance of this reflects the intentions of the parties, then the case of *Kaufman* v. *Shoe Corporation of America*, 24 Ill. App. 2d 431, 164 N. E. 2d 617 (1960) is truly and correctly distinguished. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, compels uniform results in like cases; it does not compel ignoring the real intentions of the parties when the source of ascertaining this is available. The *Kaufman* Court was confined to the four corners of the lease.

II.

The Supreme Court of the United States Will Ordinarily Accept the Interpretation of Local Law by the Circuit Court of Appeals.

A statement of this rule is found in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893, at pp. 529-530 of the official report:

"We ordinarily accept the interpretation of local law

by the Court of Appeals, cf *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 534, 93 L. Ed. 1520, 1523, 69 S. Ct. 1233, and do so readily here since neither party now disputes the interpretation."

Another statement of this appears in *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 93 L. Ed. 330, 69 S. Ct. 301.

III.

Findings Concurred in by Two Courts Below Will Not Be Disturbed Unless They Are Without Support.

This was expressed in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178, as follows:

"Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support." (Citing cases.)

The same is true in the present case. Both District Court and majority of Circuit Court of Appeals have found the intent of the parties to this lease on the subject of heating the building and installing any required heating plant.

Other expressions of this rule of practice on concurrent findings is seen in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 93 L. Ed. 672; *Baker* v. *Schofield*, 243 U. S. 114, 61 L. Ed. 626, 37 S. Ct. 333; *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 340 U. S. 147, 95 L. Ed. 479, 71 S. Ct. 453; and *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 74 L. Ed. 1034, 50 S. Ct. 427.

Conclusion.

The application of Illinois law has been correctly made by both Courts below. Both Courts have found different facts which distinguish the *Kaufman* case. Accordingly, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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